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No.: ICC-01/04-01/07

Date: 18 August 2009

TRIAL CHAMBER II

Before: Judge Bruno Cotte, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Hans-Peter Kaul

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF

***THE PROSECUTOR v. GERMAIN KATANGA AND MATHIEU NGUDJOLO
CHUI***

Public Document

**Public Redacted Version of the *Decision on the Prosecutor's Application to Redact
Information in a Video Tape* dated 18 May 2009
(ICC-01/04-01/07-1148-Conf-Exp)**

Decision to be notified in accordance with regulation 31 of the Regulations of the Court to:

The Office of the Prosecutor

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Ms Fatou Bensouda, Deputy Prosecutor
Mr Éric MacDonald, Senior Trial Lawyer

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Counsel for Mathieu Ngudjolo Chui

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Ms Carine Bapita Buyangandu
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REGISTRY

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Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Trial Chamber II of the International Criminal Court (“the Chamber” and “the Court” respectively), acting pursuant to articles 54(3)(f), 64, 68 and 69(3) of the Rome Statute (“the Statute”), rules 77, 81(2) and 81(4) of the Rules of Procedure and Evidence (“the Rules”) and regulation 35 of the Regulations of the Court, decides as follows:

I. Procedural History

1. This Decision follows the applications filed by the Prosecutor on 23 February 2009¹ (“the Initial Application”) and on 9 April 2009² (“the Second Application”) to redact information in a video tape, reference number DRC-OTP-1018-0145 (“the video”).

2. In his Initial Application, the Prosecutor asked for leave to redact a video recording covered by rule 77 of the Rules. However, in the justification table of the redactions sought, he indicated that the video was incriminating evidence.³ The Chamber therefore asked the Prosecutor for additional information in order to gain a greater understanding of the exact nature of this recording.⁴ Furthermore, although it was acknowledged that the Application was filed after the expiration of the time limit of 16 February 2009 for the filing of applications for redactions, the Prosecutor did not submit an application for the extension of time limit. He merely noted that the time limit had passed “[TRANSLATION] inadvertently” and that he had acted quickly to rectify the oversight as soon as he realised, on 19 February 2009, that it

¹ Office of the Prosecutor, “*Requête de l’Accusation aux fins d’expurgations d’informations dans une bande vidéo relevant de la Règle 77*”, 23 February 2009, ICC-01/04-01/07-912.

² Office of the Prosecutor, “*Mémoire de l’Accusation, en vertu de la norme 35, en modification de la Requête de l’Accusation [ICC-01/04-01/07-912] aux fins d’expurgations d’informations dans une bande vidéo relevant de la Règle 77 en « Requête de l’Accusation aux fins d’expurgations d’informations dans une bande vidéo à charge »*”, 9 April 2009, ICC-01/04-01/07-1052.

³ ICC-01/04-01/07-912-Conf-Exp-AnxB.

⁴ E-mails exchanged between the Legal Adviser to the Trial Division and the Office of the Prosecutor on 27 March and 7 April 2009.

had occurred.⁵ The Chamber is most dissatisfied about this oversight, reminds the Prosecutor of the procedure stipulated by regulation 35(2) of the Regulations of the Court and strongly invites him, once again, to comply with this.

3. On 9 April 2009, the Prosecutor amended his Initial Request by stating that the video in question constituted incriminating evidence. As the time limit for the disclosure of evidence of this nature and the submission of applications for redactions had expired,⁶ the Prosecutor, pursuant to regulation 35(2) of the Regulations of the Court, requested leave from the Chamber to recharacterize this video as incriminating evidence.

4. In his two Applications, pursuant to rules 81(2) and 81(4) of the Rules, the Prosecutor asked the Chamber to authorize the image distortion of the three persons appearing in the video on a permanent basis. No observations were made by either Defence Team.

5. Before the Chamber considers the applications for distortion, it will first analyse the Prosecutor's Second Application to recharacterize the video and will examine whether this falls under the provisions of regulation 35(2) of the Regulations of the Court.

⁵ ICC-01/04-01/07-912, para. 3.

⁶ *Order Fixing the Schedule for Pre-Trial Disclosure of Incriminatory and Exculpatory Evidence and the Date of a Status Conference (rule 132 of the Rules of Procedure and Evidence)*, 23 January 2009, ICC-01/04-01/07-846-tENG, p. 8.

II. The Chamber's Analysis

A. The request for extension of the time limit

6. The Prosecutor states that the video in question is a "[TRANSLATION] video of locations filmed in preparation for a forensic expert mission to the village of Bogoro and more specifically to the *Institut de Bogoro*, where victims were allegedly rounded up on 24 February 2003 before being executed and buried in the surrounding area".⁷ He specifies that the video "[TRANSLATION] was not made with a view to being submitted as incriminating evidence at the hearing."⁸

7. He asserts that the planned mission took place between 28 and 31 March 2009 and that he learnt, shortly before it began, that the premises of the Institute had been altered following renovation works dating from January 2009.⁹

8. The Prosecutor submits that, in view of the work carried out at the Institute, the photographs taken during the mission do not provide access to as much information as is featured in video DRC-OTP-1018-0145. Accordingly, he wishes to use the video which was filmed before the renovation work as incriminatory evidence and to this end requests the recharacterization of his Application for redaction no. 912.¹⁰

9. In support of the Second Application, the Prosecutor puts forward, *inter alia*, the following arguments:

[TRANSLATION] [...] The Prosecution is mindful of the fact that the Order fixing the schedule for pre-trial disclosure of incriminatory and exculpatory evidence set 30 January as the deadline for the filing of applications for the

⁷ ICC-01/04-01/07-1052, para. 4.

⁸ *Idem*.

⁹ *Ibid.*, para. 6.

¹⁰ *Ibid.*, paras. 7 to 9.

redaction of incriminatory evidence. It is also true that the Prosecution did not file an application for the extension of this time limit for this video before the close of this deadline. [...] However, the Prosecution was unaware that the scene of the crime had been altered. It discovered this only on 11 March 2009 and was able to assess the extent only during the mission that has just taken place. [...] The Prosecution therefore maintains that this meets the circumstances provided for by sentence 2 of regulation 35(2) of the Regulations of the Court and that it “was unable to file the application [for the extension of time limit] within the time limit for reasons outside its control”.¹¹

10. The Chamber considers that the situation as set out above legitimately allows the Prosecutor to invoke regulation 35(2) of the Regulations of the Court because the alteration to the premises in January 2009 which were photographed during the forensic mission, which the Prosecutor learned of only in March 2009, was indeed outside his control. The Chamber notes that only one video is at issue, which the Prosecutor says is fairly short¹² and also notes that the evidence is not completely new for the Defence, since photographs of the Institute must be disclosed to it. It notes that this Decision provides a ruling on an application for redaction, and that, subject to this redaction, the video could be disclosed to the Defence quickly, and even be submitted with the table of incriminating evidence, which must be filed by 20 May 2009. The Chamber notes that the Defence will therefore be in a position to prepare itself in an effective manner sufficiently in advance of the commencement of the trial and that this video can contribute to a better understanding of what is being discussed. It is the Chamber’s view, therefore, that the Defence will not suffer any prejudice and that the video tape can be recharacterized as incriminating evidence.

¹¹ *Ibid.*, paras. 10 to 12.

¹² *Ibid.*, para. 13.

B. The redactions sought

11. The Chamber recalls, once again,¹³ the requirements laid down by the Appeals Chamber: 1) the existence of an objectively justifiable risk to the safety of the person concerned or which may prejudice the further or ongoing investigations;¹⁴ 2) the existence of a link between the source of the risk and the accused;¹⁵ 3) the infeasibility or insufficiency of less restrictive protective measures;¹⁶ 4) an assessment of whether the redactions sought are prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial;¹⁷ and 5) the obligation to periodically review the decision authorising the redactions should circumstances change.¹⁸

12. As the Chamber has had occasion to point out more than once,¹⁹ all applications for redaction are subject to strict judicial scrutiny carried out on a case-by-case basis. Any decision whereby it authorizes non-disclosure to the Defence of part of a piece of evidence must be sufficiently reasoned in light, *inter alia*, of the arguments submitted by the Prosecutor in support of his application. The Chamber has a duty to balance the various interests at stake, as stipulated in rule 81 of the Rules, whilst

¹³ ICC-01/04-01/07-888 and ICC-01/04-01/07-889, para. 4; see also, *Decision on the Prosecutor's Application for Protective Measures Pursuant to Article 54(3)(f) of the Statute and Rule 81(4) of the Rules*, 25 March 2009, ICC-01/04-01/07-989-tENG, para. 4; *Decision on Three Prosecutor's Applications to Maintain Redactions or Reinstate Redacted Passages (ICC-01/04-01/07-859, ICC-01/04-01/07-860 and ICC-01/04-01/07-862)*, 25 March 2009, ICC-01/04-01/07-987-tENG, para. 4.

¹⁴ Appeals Chamber, *Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements"*, 13 May 2008, ICC-01/04-01/07-475, paras. 71 and 97.

¹⁵ ICC-01/04-01/07-475, para. 71.

¹⁶ Appeals Chamber, *Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence"*, 13 October 2006, ICC-01/04-01/06-568, para. 37; Appeals Chamber, *Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81"*, 14 December 2006, ICC-01/04-01/06-773, para. 33.

¹⁷ ICC-01/04-01/06-773, para. 34.

¹⁸ ICC-01/04-01/07-475, para. 73.

¹⁹ *Order Instructing the Registry to File Documents on the Influence that the Accused may have Retained in the DRC and on the Pressure that they Might Currently Exert on Victims and Witnesses*, 18 December 2008, ICC-01/04-01/07-800-Conf-tENG, para. 9; ICC-01/04-01/07-819-tENG, paras. 1 and 7; ICC-01/04-01/07-888-Conf-Exp-tENG and ICC-01/04-01/07-889-Conf-tENG, para. 3; ICC-01/04-01/07-987-Conf-Exp-tENG, para. 5.

ensuring that the proceedings include safeguards to protect the interests of the accused, so as to comply as far as possible with the requirements of adversarial proceedings and the principle of equality of arms. The Chamber has reviewed in detail each application for redaction in light of the criteria set forth in the previous paragraph.

13. The Prosecutor's application essentially seeks to obtain, pursuant to article 54(3)(f) of the Statute and Rules 81(2) and 81(4) of the Rules, leave from the Chamber to distort the image of three persons shown in the video on a permanent basis in order to ensure their protection.²⁰

i) Protection of further or ongoing investigations (rule 81(2))

14. The Chamber notes that the two persons who appear in the recording DRC-OTP-1018-0145 provided purely logistical support to the Office of the Prosecutor and that they still live and work in the Democratic Republic of the Congo²¹ (the "DRC") [REDACTED].

15. The Chamber notes the reasons put forward by the Prosecutor in support of the protective measures sought. He submits first of all that "[TRANSLATION] neither of these two persons participated in collecting evidence or took part in the filming of the video in question"²² and he emphasizes that they were filmed by chance.²³ Furthermore, "[TRANSLATION] the distortions sought are limited: they concern a fleeting image" and "[TRANSLATION] their voices cannot be heard".²⁴ According to the Prosecutor, the only effective measure is "[TRANSLATION] the permanent

²⁰ ICC-01/04-01/07-912, para. 5.

²¹ ICC-01/04-01/07-912, para. 6; ICC-01/04-01/07-912-Conf-Exp-AnxA; and ICC-01/04-01/07-912-Conf-Exp-AnxB.

²² ICC-01/04-01/07-912, para. 8.

²³ *Ibid.*, para. 9

²⁴ *Ibid.*, para. 10.

distortion of the images of these two individuals”.²⁵ Lastly, the Prosecutor does not intend to call these two persons to give evidence.²⁶

16. The Chamber notes that the distortion of the images of these persons is effectively a limited measure and that it does not seem feasible to use less restrictive measures. In the Chamber’s view, this measure does not harm the Defence’s use of the information contained in the said recording. It therefore considers that it is able to authorize the measures sought by the Prosecutor, but not through to the end of the trial, as such a measure seems excessive in view of the exercise of the rights of the Defence. It recalls that the Prosecutor will, if he considers it appropriate, be able to request, no later than 45 days prior to the commencement of the trial, that these measures be maintained.

ii) Protection of persons at risk due to the activities of the Court (article 54(3)(f) and rule 81(4))

17. The Prosecutor asks for the permanent distortion of images showing the face and clothes of a third person who appears in the video recording DRC-OTP-1018-0145. This person is present at the place where the recording is made and exchanges several words of a general nature with the cameraman. The person’s face and clothes are filmed in certain sections of the recording.²⁷

18. The Prosecutor considers that the identity of the persons whom he calls “innocent third parties” must be protected, because they live in the DRC and are, in certain cases, easily identifiable.²⁸ He specifies that he does not know the identity of the person in question²⁹ and that this person appears in the video by chance. In his view, revealing the identity could put that person at risk or potentially place that

²⁵ *Ibid.*, para. 13.

²⁶ *Ibid.*, para. 12.

²⁷ *Ibid.*, para. 15.

²⁸ ICC-01/04-01/07-912-Conf-Exp-AnxB.

²⁹ ICC-01/04-01/07-912, para. 17.

person in danger.³⁰ The Prosecutor submits that he does not intend to call this person to give evidence at trial.³¹

19. The Chamber considers that this person must be regarded as someone who could potentially be at risk due to the activities of the Court, in accordance with the position taken by the Appeals Chamber.³² Moreover, the distortion of the image does not affect the value of the information that person provides, which, in the Chamber's view, does not constitute incriminating or exculpatory evidence. Lastly, the Defence will have access to this information and will be able to assess its possible relevance.

20. As matters now stand, there are no less restrictive protective measures, given that the person's identity is not known to either the Prosecutor or the Court. The Chamber considers that the distortion of this person's image, on a permanent basis, does not put the interests of the accused at risk, and is not inconsistent with the right of the Defence to a fair and impartial trial.

21. Lastly, the Chamber recalls that it can, under rule 81(4) of the Rules, on its own motion, take the necessary steps to protect the safety of witnesses and victims and members of their families as well as persons at risk due to the activities of the Court. As such, the Chamber considers that the image distortion must also be extended to the other people who appear in the video, for whom the Prosecutor did not make an express request for image distortion. This is the case in particular for children, two other individuals and the person already mentioned in paragraph 17 above, whose identity is unknown to the Court, and who appear in the video in the sections referred to in paragraph c) of the disposition of this decision.

³⁰ ICC-01/04-01/07-912, para. 16; ICC-01/04-01/07-912-Conf-Exp-AnxB.

³¹ ICC-01/04-01/07-912, para. 18.

³² Appeals Chamber, *Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements"*, 13 May 2008, ICC-01/04-01/07-475, paras. 55 and 56.

FOR THESE REASONS, the Chamber

GRANTS the Prosecutor's applications and **AUTHORIZES**:

- a) the distortion of the image of two persons mentioned in paragraph 14 above, until 30 days prior to the date of the commencement of the trial, in the passages between 00:25 and 00:29, between 09:23 and 09:46, between 10:03 and 10:05, between 10:09 and 10:11, and between 11:07 and 11:09, corresponding to the video recording DRC-OTP-1018-0145; however, the Prosecutor will, if he considers it appropriate, be able to request, no later than 45 days prior to the commencement of the trial, that the redactions be maintained;
- b) the distortion of the image of the individual mentioned in paragraph 17 of this Decision, on a permanent basis, including the sections between 02:19 and 02:25, between 04:29 and 04:38, between 07:53 and 07:58, between 09:17 and 09:29, between 09:33 and 09:35, and between 09:43 and 09:51, corresponding to the video recording DRC-OTP-1018-0145;
- c) the distortion of the image of the individuals mentioned in paragraph 21 of this Decision, on a permanent basis, in the sections between 02:08 and 02:34, between 09:52 and 09:56, and between 09:59 and 10:02, corresponding to the video recording DRC-OTP-1018-0145;

DIRECTS the Prosecutor to disclose the video DRC-OTP-1018-0145 as soon as possible; and

ORDERS the Prosecutor to use the information relating to the video in the table of incriminating evidence, which must be filed by 20 May 2009.

Done in both English and French, the French version being authoritative.

[signed]
Judge Bruno Cotte
Presiding Judge

[signed]
Judge Fatoumata Dembele Diarra

[signed] 18/8/09
Judge Hans-Peter Kaul

Dated this 18 August 2009,

At The Hague, The Netherlands